United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

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75-4099 75-4126

United States Court of Appeals

For the Second Circuit

Docket No. 75-4099

AMERICAN CAN COMPANY,
Petitioner,

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Intervenor,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Docket No. 75-4126

LOCAL ONE, AMALGAMATED LITHOGRAPHERS OF AMERICA, INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
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and

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P/S

BRIEF ON BEHALF OF PETITIONER LOCAL ONE, AMALGAMATED LITHOGRAPHERS OF AMERICA, INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO

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PRELIMINARY STATEMENT

This is an appeal from a decision and order of the National Labor Relations Board ("Board") entered on May 30, 1975. This decision is officially reported at 218 NLRB No. 17. The Board found that American Can Company ("Employer") did not violate Sections 8(a)(5) and (1) of the Act by refusing to recognize and bargain collectively with Local One Amalgamated Lithographers of America, AFL-CIO ("ALA") as the exclusive bargaining representative of lithographic production employees at Employer's plant in Edison Township, New Jersey ("Regency"). Part I of this brief deals with this issue.

The Board did find that the Employer violated §§8(a)(1), (2) and (3) of the Act by entering into and enforcing a collective bargaining agreement with the United Steelworkers of America, AFL-CIO ("Steelworkers") which included lithographic production employees, together with other production and maintenance employees at Regency, while a real question concerning representation of the lithographic production workers existed. Part II of this brief supports the Board's findings.

PRIOR PROCEEDINGS

On September 2, 1973, ALA filed charges against the Employer alleging violations of §§8(a)(1), (2) and (3) of the Act. Additional charges were filed on March 5, 1974, alleging violations of §8(a)(5) of the Act. These charges were consolidated and a hearing was held before Administrative Law Judge Milton Janus. On October 23, 1974, the Administrative Law Judge issued a decision recommending that the complaint be dismissed in its entirety. ALA and Counsel for the General Counsel filed exceptions to the Board. On May 30, 1975, the Board, with members Jenkins, Kennedy and Pennelo sitting, rendered a decision which in addition to the findings described above, amended the certification issued to the Steelworkers to exclude lithographic production employees.

STATEMENT OF FACTS

ALA and the Employer have had a collective bargaining relationship for thirty years at Employer's Hudson plant (17a)*. The current contract between ALA and Employer at Hudson will not expire until April of 1976 (19a). On or about August 8, 1972, the

*References are to the printed appendix.

Employer announced that its Hudson plant would close within the next year and a half (18a).

On December 20, 1972, the Employer announced that it would open a new plant (Regency) about 26 miles from the Hudson plant (18a). Regency would manufacture only aerosol aluminum cans, a line of cans manufactured at Hudson for many years (28a) Shortly thereafter, ALA contacted the Employer to ascertain whether or not the Employer intended to apply the Hudson contract to lithographic production employees at Regency. The Employer stated that it would consider Regency a new plant; that it hoped Regency would be unorganized and that if Regency were organized, it would prefer a "wall to wall" unit (3a, 28a). ALA then notified the Employer in a letter dated January 19, 1973, that an overwhelming majority of the Hudson lithographic production employees desired to transfer to Regency and to be represented by ALA at Regency. ALA further advised of its intention to continue to represent lithographic production employees at Regency (331a). The Employer replied that it was not obligated to recognize ALA as the

representative of any lithographic employees that it might employ at Regency (19a). Thereafter, the Employer was served with a petition signed by all of the Hudson lithographic production employees, advising the Employer of their desire to work at Regency and to be represented by ALA (18a-19a).

On July 7, 1973, the Employer began manufacturing aerosol cans at Regency (20a). On August 23, 1973, the Steelworkers filed a representation petition for "all production and maintenance employees, including lithographers" at Regency (21a). At that time, there were sixty-four production and maintenance employees at Regency (21a). Fifty-three of these employees were former Steelworker members from Hudson. There were no lithographic production employees employed at Regency at that time (21a).

On or about September 10, 1973, the Regional Director for Region 22 approved a stipulation for certification upon consent election. The unit described in the certification made no reference to lithographic employees. An election was scheduled for September 21, 1973 (4a).

On September 19, 1973, ALA learned of the scheduled election for the first time (21a). On the next day, September 20, 1973, ALA hand delivered a letter to the Regional Director objecting to the failure to define the unit as excluding lithographic production workers (21a). Notwithstanding the foregoing, the election proceeded as scheduled and the Steelworkers won by a margin of 84 to 2 (22a). No lithographic production employees were employed at that time and consequently none participated in that election. The results of the election were certified and the Employer entered into a collective bargaining agreement with the Steelworkers containing a union security clause (22a).

In the meantime, the Employer had been transferring lithographic equipment from Hudson to Regency. In addition, supervisors in the Hudson lithographic department were transferred to the Regency lithographic department (21a). The Employer then set about hiring lithographic production employees "off the street" without notifying ALA and without its knowledge (182a).

Thereafter, on October 12, 1973, the Employer without notice to ALA, offered jobs at Regency to five lithographic production employees represented by ALA at Hudson. These offers were conditioned upon membership in the Steelworkers. The employees would work under the terms of the Steelworkers contract for lower wages and less by way of fringe benefits. All five of the employees rejected the offers (23a).

PART I

ISSUE

1. Did the Employer violate Sections 8(a)(5) and (1) of the Act by refusing to recognize and bargain collectively with ALA as the exclusive bargaining representative of lithographic production employees at Regency?

ARGUMENT

THE EMPLOYER VIOLATED SECTIONS 8(a)(5) and (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN COLLECTIVELY WITH ALA AS THE EXCLUSIVE BARGAINING REPRESENTATIVE OF LITHOGRAPHIC PRODUCTION EMPLOYEES AT REGENCY

The Board, without opinion, affirmed the decision of the Administration Law Judge concerning this issue.

The Administrative Law Judge had based his decision upon three considerations. (1) Regency was not a continuation of the Hudson plant; (2) the Employer did not frustrate the course of collective bargaining by committing independent unfair labor practices; (3) ALA waived its right to bargain over effects (20a). None of these reasona are well founded.

The right of a union to transfer its bargaining status from one plant to another arises in plant relocation cases. There is no problem during an uneventful plant relocation. There, an employer decides, for justifiable economic reasons, to relocate its plant. It advises the union of its intention to do so and the parties negotiate concerning the rights of the union's membership to transfer to the new location. If a sufficient number of the union's members transfer to the new location so as to constitute a majority there, the union's representative status transfers to the new location; Fraser & Johnston Company v. NLRB, 469 F.2d 1259 (9th Cir. 1972); cf. NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972).

However, problems arise when an employer frustrates the employees' attempts to transfer to the new location. Then, the union in the old plant will be deemed to represent the employees in the new plant if it can be found that, but for the employer's unlawful conduct, a sufficient number of employees would have transferred so as to constitute a majority at the new plant; Cooper Thermometer Company v. NLRB, 376 F.2d 684 (2nd Cir. 1967); Fraser & Johnston Company v. NLRB, supra. Before a union's representative status can be transferred to a new plant, three criteria must be met: (1) The operations of the new plant must be a continuation of the operations of the old plant; (2) The employer committed unfair labor practices to prevent employees from transferring to the new plant; and (3) But for these unfair labor practices, a sufficient number of employees would have transferred to the new plant so as to constitute a majority at the new plant.

CONTINUATION OF THE OPERATIONS

The Administrative Law Judge found that Regency was not a continuation of the Hudson plant. His conclusion was based upon a comparison of the

sizes of the two plants, i.e. whereas Hudson, in its peak years, produced over a billion containers of various types and employed approximately 1800 employees, Regency would produce only aerosol cans and employ approximately 250 employees.*

The comparative sizes of the two plants should never have been in issue. It is the nature of the operation that determines whether the operation is continued at a new plant. Is the nature of the operation at the new location basically the same as the one at the old plant? Are the jobs at the two plants essentially the same? If so, the new plant is a continuation of the old plant and the employees from the old plant may transfer to the new plant. That is the test.

That is why the Court in Fraser & Johnston Company considered such factors as company name,

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*Not only was the comparison of the relative sizes of these plants irrelevant, it was unfair. At the time the Employer decided to close Hudson, most of its past operations had already been curtailed (207a). There were only 500 employees at Hudson as opposed to the expected complement of 250 employees at Regency. Moreover, the expected size of the lithographic unit at Regency will be virtually the same as the size of the one at Hudson at the time it was decided to close Hudson.

products, machinery, operational methods and supervision; 469 F.2d at 1262; see also Royal Data Tool and Machine Co., 132 NLRB 108 (1961); International Ladies' Garment Workers U. v. NLRB, 463 F.2d 907 (D.C. Cir. 1972); Burroughs Corp., 214 NLRB No. 88 (1974).

The Administrative Law Judge waived off this concept on the grounds that "neither jobs nor representation rights adhere to specific pieces of machinery or manufacturing processes" (33a). While it may be generally true that representation rights do not adhere to specific pieces of machinery or manufacturing processes in removal cases, comparisons between machinery and manufacturing processes for the purpose of determining whether the jobs are essentially the same are key.

There can be no question that the job functions for lithographic employees at Regency were identical to the job functions at Hudson. All of the lithographic equipment currently used at Regency came from Hudson (174a); all of the lithographic supervisors at Regency came from Hudson (175a). As found by the Board "there is no evidence that the work and skills of the lithographic

production employees at the two plants were expected to be significantly different" (6a).*

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*The Board's finding is well grounded. The lithographic process is the lithographic process and it makes no difference whether that process is applied to a beer can, an aerosol can or whatever - the skills involved in the lithographic process are identical. It is because of this fact that the traditional lithographic unit including lithographic employees only, and excluding all others, has been found appropriate in plants of all descriptions regardless of the product produced where the lithographic process has been utilized and where the petitioner has sought the traditional lithographic unit. Thus the unit has been granted not only in commercial printing shops but in plants producing metal toys (Louis Marx & Co.) 6-RC-770 (Sept. 1951), games (Milton Bradley Company) 1-RC-5156 (June 1958), cartons (Dairypak, Butler, Inc.) 18-RC-3906 (June 1959), boxes (Malnove Specialty Box Company) 17-RC-2869 (April 1959), cash registers and forms (National Cash Register Co.) 119 NLRB No. 62 (Nov. 1957), advertising (Advertisers Associates, Inc.) 6-RC-2032 (April 1958), magazines (McCall Corporation) 118 NLRB No. 1332 (Sept. 1957), paper products (Harvey Paper Products Company) 117 NLRB No. 116 (Aug. 1956), broilers (Roto-Broil Corporation of America) 2-RC-8025 (July 1956), airplanes (Boeing Airplane Company) 17-RC-2045 (Oct. 1955), etc.

The Board and Regional Directors have followed the same policy in regard to granting the traditional lithographic unit in metal decorating plants including can manufacturing plants engaged in the manufacture of all manner of cans: National Can Corporation, 8-RC-4859 (Nov. 1962); Hunt Foods and Industries, Inc., 21-RC-7556 (June 1962); Hunt Foods and Industries, Inc., 20-RC-5308 (June 1962); Reynolds Metal Company, 10-RC-5123 (Dec. 1961); Continental Can Company; 119 NLRB No. 1853 (Feb. 1958); Pittsburgh Metal Lithographing Co., Inc.,

UNFAIR LABOR PRACTICES COMMITTED BY THE EMPLOYER

The Administrative Law Judge further found that even assuming a relocation employer was not obliged to bargain with ALA because it did not commit independent unfair labor practices as did the employer in Fraser & Johnston and Cooper Thermometer. In Fraser & Johnston, the employer refused to bargain with the unions in its old plant because it maintained that it was obligated to recognize a union with which it had a contract covering employees at the new plant. For maintaining this cavalier position, the employer was found to have violated §8(a)(2) in that it failed to remain neutral when confronted with a question of representation. Because the contract that the employer

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6-RC-1962 (Aug. 1957); American Can Company, 114 NLRB No. 1547 (Dec. 1955); American Can Company, 3-RC-1455 (Dec. 1954); Valley Manufacturing Co., 8-RC-2324 (Dec. 1954); Continental Can Company, 110 NLRB 409 (Oct.1954); American Can Company, 110 NLRB No. 3 (Sept. 1954); The Standard Oil Company (Ohio), Lithograph Can Factory, 8-RC-1844 (Jan. 1953); The Ohio Can and Crown Company, 8-RC-1823 (Jan. 1953); R.M. Hollingshead Corporation, 4-RC-1332 (Mar. 1952); The Heekin Can Company, 89 NLRB No. 717 (Apr. 1950); The Heekin Can Company, 97 NLRB No. 783 (Dec. 1951); Bond Crown & Cork Co., 75 NLRB 1152 (Jan. 1948); Bond Crown & Cork Co., 83 NLRB 683 (May 1949).

entered into with the union at the new plant contained a union security clause, the employer was found to have violated §8(a)(3) as well. These are the exact same unfair labor practices that the Board found the Employer to have committed (8a). See also NLRB v. Hudson Berlind Corporation, 494 F.2d 1200 (2d Cir. 1974); International Paper Co., 150 NLRB 1252 (1965).

In addition, the Board found that when the Employer and the Steelworkers entered into a consent election, the Employer deliberately concealed ALA's interest in that election from the Board agent handling the case. This also constitutes a violation of §8(a)(2); U.S. Chaircraft, Inc., 132 NLRB 922 (1961); Lunardi-Central Distributing Co., 161 NLRB 1443 (1966); Somerville Iron Works, 117 NLRB 1702 (1957).

Although not discussed by the Board, there were other unfair labor practices as well. As indicated above, the Employer from the very outset took the position that Regency was a new operation and that it had no obligation to deal with ALA relative thereto. Thus it dealt with ALA employees at Hudson on an individual basis with respect to employmert at Regency.

This constituted an independent violation of §8(a)(5); Cooper Thermometer v. NLRB, supra; Die Supply Corporation, 393 F.2d 462 (1st Cir. 1968); Robertshaw Controls Co., 161 NLRB 103 (1966). Moreover, the Employer refused to consider qualified ALA members from Hudson for employment at a time when it extended offers of employment to "good solid applicants off the street". (182a) This constitutes a violation of §8(a)(3). Helrose Bindery, Inc., 204 NLRB 499 (1973); Piasecki Aircraft Corp., 123 NLRB 348 (1959); California Footwear Co., 114 NLRB 765 (1955). The Employer therefore not only committed the same unfair labor practices as did the employers in Fraser & Johnston and Cooper Thermometer, but committed other unlawful acts as well.

TRANSFERS TO REGENCY

Neither the Administrative Law Judge nor the Board addressed the question of whether a sufficient number of Hudson employees would have transferred to Regency but for the Employer's unfair labor practices. In Cooper Thermometer and Fraser and Johnston, the Courts concluded that the record in those cases did

not support an inference that a sufficient number of employees would have transferred in the absence of a union security clause. Such is not the case here.

Here, all of the lithographic production employees at Hudson signed a petition requesting transfers to Regency. Five of these employees applied for work at Regency. All five refused work because acceptance of work would have required them to terminate their membership in ALA, join the Steelworkers, and work under terms and conditions of the Steelworkers contract at lower wages and less by way of fringe benefits. It is absurd to assume that an ALA Hudson employee would have accepted employment at Regency under such terms and conditions. Obviously, the five applicants relayed the message to their fellow lithographic production employees at Hudson who, in the light of such circumstances, saw no useful purpose being served in pursuing the matter further.

On the other hand, it is clear that a substantial number of the ALA employees would have taken employment at the Regency plant had the Employer not

applied the Steelworkers contract to them. In that situation, the employees would have had every reason to believe that they would continue as members of ALA, thereby retaining their ALA pension credits.* Even if the transfers involved wage reductions, the ALA members would have transferred because ALA had a substantial number of its members unemployed at that time. The distance between the plants was not even an issue. New Jersey is virtually bereft of public transportation and practically all working men are car owners.

Finally, the fact that a substantial number of Steelworkers transferred from the Hudson plant to Regency so as to constitute a majority at Regency is evidence that a sufficient number of ALA employees would have transferred also had they been afforded an opportunity to do so under the same circumstances; ie., without having to join another union and without having to forfeit valuable rights.

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*Had the five employees accepted employment under the Steelworkers contract, they would have lost pension credits. Under the Steelworkers contract, Grupe's pension credits would have been reduced from 28 years to 11 (116a); Poznanski's from 24 years to 11 (233a, 234a); Lemke's from 27 years to 16 (144a); Rizzardi's from 16 years to 8 (124a); and Amorese's from 11 1/2 years to 5 (230a).

WAIVER

The Administrative Law Judge concluded that ALA waived its rights to bargain over the effects of the closing of the Hudson Plant (35a). From this, he concluded that the Employer had no duty to bargain over transfers from Hudson to Regency or to recognize ALA as the collective bargaining representative of lithographic production employees at Regency.

ALA was not interested in bargaining over the effects of the Hudson closing. It was not seeking severance benefits for Hudson employees. It was only interested in finding work for Hudson employees at Regency and representing these employees at Regency. The Employer had a duty to bargain with ALA concerning the transfer to Regency; Fraser & Johnston v. NLRB, supra; Cooper Thermometer v. NLRB, supra; International Ladies' Garment Workers U. v. NLRB, 463 F.2d 907 (D.C. Cir. 1972); Arnold Graphic Industries, 206 NLRB No. 43 (1973); Burroughs Corp., 214 NLRB No. 88 (1974). Had the Employer met this duty,

and had a sufficient number of Hudson employees transferred to Regency, ALA's representative status would have transferred to Regency as a matter of law; Fraser & Johnston v. NLRB, supra.

A question of waiver would be relevant herein if ALA waived its right to bargain over transfers to Regency. That there was no such waiver is evident from the record. The Employer first announced the opening of the Regency plant on December 20, 1972. Immediately thereafter, Edward Hansen, then executive vice-president of ALA, called the Employer "to find out what was happening and to express his concern about the lithographic employees losing their jobs" (18a). On January 19, 1973, Hansen wrote as follows:

> As an overwhelming majority of the employees whom we represent have signified their desire to work at the Edison [Regency] plant and to continue to be represented by us, we will expect you to continue to recognize Local One [ALA] as the collective bargaining agent of your lithographic employees.
>
> We are taken aback that you did not see fit to advise us of this development and give us the opportunity to discuss it with you. (19a)

On or about January 20, 1973, the ALA sent the Employer a petition signed by all the lithographic employees at Hudson, advising the Employer that they all desired to work at the Regency plant (19a). On March 7, 1973, Hansen wrote again stating that ALA expected its members to be transferred to Regency (19a). Finally, in mid-May 1973, Hansen again requested to discuss the transfers to Regency. As found by the Administrative Law Judge:

> "Among other matters, Hansen raised the Hudson closing and the Regency opening, and asked if the Company had changed its position on employing lithographic employees from Hudson at Regency, and on his union representing them."
> (20a)

From the very outset, the Employer took the position that it had no duty to bargain with ALA regarding transfers to Regency and that ALA had no bargaining status with respect to Regency employees. It maintained this position throughout and acted on the basis thereof.

The uncontroverted findings of the Administrative Law Judge show a pattern of repeated attempts by ALA to

bargain over transferring Hudson employees to Regency. The Administrative Law Judge's finding of a waiver is at direct odds with this evidence and must be reversed; Universal Camera Co. v. NLRB, 340 US 374 (1951).

The Administrative Law Judge apparently based his finding of waiver on the fact that transfers and ALA representation at Regency were not discussed when the Hudson contract was negotiated in April of 1973. He relied upon U.S. Lingerie Corp., 170 NLRB 750 (1968), a case easily distinguished from the instant case. There, the employer, who was a member of a multi-employer bargaining unit, announced that it intended to relocate its plant and to withdraw from the multi-employer bargaining unit. At that time, the union was negotiating a new contract with the multi-employer unit. The union simply advised the employer that it intended to hold it to the multi-employer contract, once it was negotiated. No further action was taken by the union. The union made no demand to negotiate with respect to transfers to the new plant.

A waiver may not be culled from the fact that transfers were not a subject of collective bargaining

when a contract covering the Hudson employees was negotiated in April of 1973 (19a, 20a). Unlike the union in U.S. Lingerie, ALA made repeated demands to bargain over transfers to Regency, both before and after the April contract negotiations. All such demands were rejected or ignored by the Employer. A waiver of the right to bargain is not to be lightly inferred and must be clear and unmistakable; NLRB v. R.L. Sweet Lumber Co., 515 F.2d 785, 795 (10th Cir. 1975); Timken Roller Bearing Co. v. NLRB, 325 F.2d 746, 751 (6th Cir. 1963), cert. denied 376 U.S. 971 (1964); New York Mirror, 151 NLRB 834 (1965).

In R.L. Sweet Lumber Co., the Court wrote:

> A further waiver argument is made on the failure of the Carpenters Union to attempt bargaining conerning the Olathe plant when the Roe Boulevard contract was negotiated in April and May of 1972. There was no discussion by the Union concerning the Olathe employees in those negotiations. However, the failure to make such a demand in those negotiations was found not to have absolved respondent of its duty to bargain, and we sustain this determination. Any such waiver of the Union's right to bargain must be clear and unmistakable. . . . In addition, we are not persuaded by the waiver argument since it would

> be futile that the Carpenters Union again attempt to bargain about the Olathe plant when efforts to do so have been rebuffed three times previously.
> 515 F.2d at 795 [emphasis supplied]

It is submitted that R.L. Sweet Lumber Co. is dispositive of the question of waiver.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Employer violated Sections 8(a)(5) and (1) of the Act by its refusal to recognize and bargain collectively with ALA as the exclusive bargaining representative of lithographic production employees at Regency.

PART II

The following is ALA's reply to briefs filed on behalf of the Employer and the Steelworkers in connection with the Board's findings that the Employer violated Sections 8(a)(1), (2) and (3) of the Act.

ISSUE

1. Did the Employer violate Sections 8(a)(1), (2) and (3) of the Act by entering into and enforcing a collective bargaining contract with the Steelworkers which provided that lithographic production employees at the Regency plant be included in the production and maintenance unit represented by that labor organization.

ARGUMENT

THE EMPLOYER DID VIOLATE SECTIONS 8(a)(1), (2) and (3) OF THE ACT BY ENTERING INTO AND ENFORCING A COLLECTIVE BARGAINING AGREEMENT WITH THE STEELWORKERS WHICH PROVIDED THAT LITHOGRAPHIC PRODUCTION EMPLOYEES AT THE REGENCY PLANT BE INCLUDED IN THE PRODUCTION AND MAINTENANCE UNIT REPRESENTED BY THAT LABOR ORGANIZATION

The Board found that the Employer violated Sections 8(a)(1) and (2) of the Act by entering into

a contract with the Steelworkers which included lithographic production employees in its production and maintenance unit. In essence, this is a contract with a union security clause. The Employer and the Steelworkers argue that the Board's decision in this regard improperly applies and extends the Midwest Piping Doctrine* and disregards the statutory scheme for representation elections and its own General Extrusion Doctrine.** The Employer argues that the Board's decision and remedy could be justified, if at all, only on the basis that the certicication was fraudulently obtained (Employer's brief at 13). The Employer contends that the evidence does not support such a finding of fraud. As will be set forth below, (1) the Board's decision is justified under the Midwest Piping Doctrine, even in the absence of a finding of fraud; (2) the Employer's protestations that the General Extrusion Doctrine was violated have no merit; and (3) the Board's finding that the certification was fraudulently obtained is well supported in the record.

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* Midwest Piping & Supply Co. Inc, 63 NLRB 1060 (1945)
** General Extrusion Co., Inc., 121 NLRB 1165 (1958)

MIDWEST PIPING DOCTRINE

The Board found that the Employer unlawfully assisted the Steelworkers in violation of §§8(a)(2) and (1) of the Act when it entered into a collective bargaining agreement with the Steelworkers which included lithographic production employees together with other production and maintenance employees at the Regency plant, while a real question concerning representation of the lithographic production employees existed (7a, 8a).

In arriving at this conclusion, the Board relied upon Midwest Piping & Supply Co., Inc., 63 NLRB 1060 (1945) (the "Midwest Piping Doctrine"). In Midwest Piping, two unions sought to represent the same unit of employees. The employer chose to recognize one of the unions without attempting to determine that union's majority status. The Board found the employer to be in violation of §8(a)(2) of the Act for its failure to remain neutral in the face of conflicting claims of representation. Stated succinctly, the Midwest Piping Doctrine requires an employer to remain neutral when a real question concerning repre-

sentation exists; NLRB v. Hudson Berlind Corp., 494 F.2d 1200 (2d Cir. 1974); Empire State Sugar Co. v. NLRB, 401 F.2d 559 (2d Cir. 1968). What constitutes a real question concerning representation is the central issue herein.

The Employer contends that a real question concerning representation can exist only when the complaining union can demonstrate that it represents a majority of the employees in the unit. It capitalizes upon a disagreement between the Board and several circuit courts concerning the extent of employee support to require a finding of a real question concerning representation. The Board's position is that the sole requirement under Midwest Piping is that the claim of the rival union must not be clearly unsupportable and lacking in substance; 5a citing Playskool Inc., 195 NLRB 560 (1972); American Bread Company, 170 NLRB 85 (1968).

The Employer alleges that the Board's view of Midwest Piping is expanded and has been "uniformly rejected by the Courts of Appeal where an employer has recognized one of two competing unions on the basis of

a clear demonstration of majority support; Employer's brief at 15 citing Playskool Inc. v. NLRB, 477 F.2d 66 (7th Cir. 1973); NLRB v. Peter Paul Inc., 467 F.2d 700 (9th Cir. 1972); Modine Manufacturing Co. v. NLRB 453 F.2d 292 (8th Cir. 1971); American Bread Co. v. NLRB, 411 F.2d 147 (6th Cir. 1969); NLRB v. Air Master Corp., 339 F.2d 553 (3rd Cir. 1964); Iowa Beef Packers, Inc. v. NLRB, 331 F.2d 176 (8th Cir., 1964); NLRB v. North Electric Co., 296 F.2d 137 (6th Cir. 1961); NLRB v. Wheland Co., 271 F.2d 122 (6th Cir. 1959); District 50 UMW v. NLRB, 234 F 2d 565 (4th Cir. 1956); NLRB v. Indianapolis Newspapers, 210 F.2d 501 (7th Cir. 1954); NLRB v. Corning Glass Works, 204 F.2d 422 (1st Cir. 1953).

The Employer has laid down a smoke screen. In all of the foregoing cases, the employers recognized one of two unions competing to represent employees that were currently employed in the employers' plants. If ALA had sought to represent a plant wide unit in competition with the Steelworkers, it would have fallen within the area that is disputed by the Board and the various Circuit Courts. This Court is not asked to take sides in this dispute.

Rather, this Court is asked to determine whether a real question concerning representation existed upon an examination of factors other than a showing of majority support. Because there were no employees in the unit in question at the time the contract was entered into, neither the Steelworkers nor ALA could claim a "clear demonstration of majority support"; NLRB v. Playskool, Inc. supra, at 70. This does not mean, however, that a real question concerning representation did not exist. Nor would it require an "expanded view" of the Midwest Piping Doctrine to determine this question.

The factors considered by the Board in this case are as follows:

> For many years the ALA had represented the lithographic production employees at the Hudson plant which was expected to be phased out and replaced in part by the Regency plant. Respondent had invited employee applications, including applications from lithographic production employees, for transfer to the new plant. It was also planning to transfer and did transfer some of the lithographic equipment from the Hudson plant to the Regency plant. There is no evidence that the work and skills of lithographic production employees at the two plants were expected to be significantly different.

> And from the time that the ALA learned of the contemplated change in operations it made known to Respondent its claim to represent lithographic production employees at the Regency plant.
> (6a)

The Board applied these factors to the Midwest Piping Doctrine by relying upon NLRB v. Hudson Berlind Corp., 494 F.2d 1200 (2d Cir. 1974); see also Fruehauf Trailer Corp., 162 NLRB 195 (1966); National Carloading Corp., 167 NLRB 801 (1967). In Hudson Berlind, the employer formed a new plant by merging two older facilities. The employer recognized the union that represented the employees from the larger of the two older facilities. As here, recognition was extended to this union prior to the actual transfer of work to the new facility. The union that represented the employees at the smaller facility filed 8(a)(2) charges alleging a violation of the Midwest Piping Doctrine. The Board held that the very circumstances of the merger raised a real question concerning representation; 203 NLRB No. 63 (1973).

In enforcing the Board's determination, this Court held that there was a real question concerning representation at the time the contract was signed in spite of the fact that the union which the Employer

recognized had a significant numerical superiority prior to the merger. The court noted that since operations at the new facility had not yet commenced, it was not clear how many employees from each union would transfer. 494 F.2d at 1203. The Court also held that since there was a real question concerning representation, the presence of a union security clause in the agreement violated §8(a)(1) and (3); 494 F.2d at 1203.

GENERAL EXTRUSION DOCTRINE

The smoke thickens when the Employer attempts to tie General Extrusion Company, Inc., 121 NLRB 1165 (1958) into the Midwest Piping Doctrine. General Extrusion holds that an election is proper in an expanding unit when thirty percent of the employees are hired and fifty percent of the expected job classifications are filled. The Employer accused the Board of failing to acknowledge or address itself to the substance of General Extrusion (Employer brief at 23). The Board refused to do so because, like a showing of majority support, General Extrusion is irrelevant.

The Employer's complaint under General Extrusion is as follows:

> What the Board has done without discussion in its present decision is to hold that if one of the unfilled job classifications under the General Extrusion test is a craft group, then any election conducted in the overall unit pursuant to General Extrusion must exclude the craft group from the appropriate unit even if there are no present craft employees. Never before has the Board read such an exception into its General Extrusion Doctrine. (Employer's brief at 24)

The Board's silence on General Extrusion compels no such finding. Again, the true issue is a real question concerning representation, not the exclusion of a craft group from an appropriate unit. Under General Extrusion, those employees who are hired after an election accrete into the unit. In the absence of an objection, craft unit employees may accrete into the unit as well as unskilled workers.

However, craft unit employees cannot be accreted in to a unit in the face of an objection to such accretion*; Captive Plastics Inc., 209 NLRB No. 118 (1974); Airmatics Systems Division of Mosler Safe Co., 209 NLRB No. 6 (1974). In Airmatics Systems, the

*That the unit in question is a craft unit and ALA is qualified to represent the members of this unit is clear. See footnote at p. 11, 12.

employer had successive contracts with the Teamsters covering its production and maintenance workers. Its tool room employees were not covered under this contract. When the Tool and Die makers sought to represent these employees, the employer extended its contract with the Teamsters to cover the toolroom employees on the theory that these employees represented an accretion to the existing unit. The Board found that a real question concerning representation existed by reason of the Tool and Die Makers demand for recognition and because several tool room employees had struck to be represented by the Tool and Die Makers. It was therefore a violation of the Midwest Piping Doctrine to accrete the toolroom employees into the existing unit.

The same result prevails herein. There is no question that the plant wide election in which only the Steelworkers appeared on the ballot was proper. Indeed, ALA could not participate in this election; Mrs. Tucker's Products, 106 NLRB 553 (1953). However, it does not follow that employees in the proposed lithographic unit automatically accreted into the plant wide unit. The Employer's attempt to achieve this result

violates §§8(a)(2) and (3). NLRB v. Hudson Berlind, supra; Captive Plastics, supra; Airmatics Systems, supra; International Paper Company, 150 NLRB 1252 (1965); Cooper Thermometer, 160 NLRB 1902, enf'd in part, 376 F.2d 684 (2d Cir. 1967).

THE CERTIFICATION WAS FRAUDULENTLY OBTAINED

The Employer alleges that it could be found liable for rendering unlawful assistance to the Steelworkers, if at all, upon a showing that the certification was fraudulently obtained (Employer's brief at 13). As set forth above, such a showing of fraud is not required. The Employer's failure to remain neutral in the face of a real question concerning representation is sufficient to justify the Board's remedies. However, there is ample evidence in the record to support the Board's finding that the Employer withheld vital information from the Board. Accordingly, the Board's findings in this regard should not be disturbed; Universal Camera Corp. v. NLRB, 340 US 474 (1951)

Like the other issues in its brief, the Employer's denials that it withheld vital information from the Board is shrouded in smoke. It admits that

the Administrative Law Judge found that the Company did not inform the Regional Office that ALA was asserting that it should be recognized as the representative for all of the lithographic employees who would eventually be hired at Regency (Employer's brief at 27). However, the Employer does not consider this finding to be crucial. Rather, it focuses upon findings that the Board agent was satisfied that ALA had no right to participate in the election. It states that employees who voted in the election were not coerced (Employer's brief at 29), and since the election was not tainted by fraud or unfair dealing, the eventual certification of the results of the election and the resultant contract with the union security clause are all valid.

Again, the Employer misses the point. It was not the election that was tainted with fraud, but the scope of the certified unit. ALA did not seek to participate in the election. Indeed, it could not. All that ALA sought to do was to prevent the Employer and the Steelworkers from taking the proposed lithographic unit by fiat.

That the Employer and the Steelworkers attempted to accomplish this fiat by having the lithographic unit included in the plant wide unit is clear. They proposed a unit that specifically included lithographers. This phrase was omitted by the Board agent upon the Employer's assurance that there were no lithographic employees then employed at Regency (21a, 4a). Notwithstanding this, the Employer subsequently entered into a collective bargaining agreement with the Steelworkers which attempted to include lithographers under a union security clause. Had the Employer and the Steelworkers been completely open with the Board agent, the possible application of this union security clause would have been foreclosed.

However, the Employer only chose to advise the Board agent that there were no lithographers currently employed at Regency. This disclosure merely allowed the election to proceed as scheduled. The Employer chose not to disclose that the ALA expressed an interest in representing lithographers that would be subsequently employed at Regency. It thereby withheld information that was relevant for the determination

of a real question concerning representation. Its failure to do so constitutes a violation of §8(a)(2); US Chaircraft, 132 NLRB 922 (1961); Lunardi-Central Distributing Co., 161 NLRB 1443 (1966); Somerville Iron Works, 117 NLRB 1702 (1957); cf. Midwest Piping & Supply Co., supra.

The record is replete with evidence that the Employer knew of ALA's claim. ALA and the Employer had communicated numerous times on the issue (18a, 19a, 20a). The telephone conversation between Board agent Schectman and Employer's official Reis supports this finding. When asked if he knew of any ALA interest at Regency, Reis referred Schectman to the company headquarters in Greenwich, Connecticut (22a). Yet, Reis knew of ALA's interest. He had seen ALA's letter of January 19, 1973, wherein ALA demanded to represent lithographic employees at Regency. He had also seen the petition which the Hudson lithographers had sent to the Employer expressing their interest in working at Regency and being represented by ALA (22a). The Board's findings that the Employer withheld vital information from ALA should not be disturbed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Board's decision that Employer violated Sections 8(a)(1), (2) and (3) of the Act for entering into and enforcing a collective bargaining agreement with the Steelworkers which included lithographic employees in the production and maintenance unit at Regency be affirmed.

Respectfully Submitted,

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November 14, 1975

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Rachel Meilik, being duly sworn deposes and says, that deponent is not a party to this action, is over 18 years of age and resides at 2205 Avenue X, Brooklyn, New York. That on the 26th day of January, 1976, deponent served the within Brief upon:

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at the addresses designated by said attorneys for that purpose by depositing true copies of same enclosed in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Rachel Meilik
Rachel Meilik

Sworn to before me this
26th day of January, 1976
Patricia Kelly

PATRICIA KELLY, Notary Public
State of New York, No. 03-7220625
Qualified in Bronx County
Cert. Filed in New York County
Commission Expires March 30, 1976